Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington D.C. 20554

In the Matter of Petition of the United Power Line Council for a Declaratory Ruling Regarding the Classification of Broadband Over Power Line Internet Access Service as an Information Service	WC Docket No. 06-10

To: The Commission

JOINT CABLE OPERATOR COMMENTS

FLORIDA CABLE & TELECOMMUNICATIONS ASSOCIATION
CABLE TELEVISION ASSOCIATION OF GEORGIA
CABLE TELECOMMUNICATIONS ASSOCIATION OF MARYLAND, DELAWARE, AND THE DISTRICT OF COLUMBIA
CALIFORNIA CABLE & TELECOMMUNICATIONS ASSOCIATION
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SUMMARY

The Commission's interest in facilitating the widest possibly array of communications technologies and services is well known. Nonetheless, the Commission must prevent electric utilities that have the opportunity, and with BPL, the motive, from using their control over poles to harm cable operators as these electric utilities deploy and market competitive services. Indeed, the potential for anticompetitive and discriminatory pole attachment practices will be greatly enhanced if the Commission grants the regulatory relief requested by the United Power Line Council ("UPLC") without imposing corresponding regulatory protections for attachers. Specifically, if the Commission grants the relief and classifies BPL service as an information service, the Commission should also find that the term "capacity" under Section 224(f)(2) refers to all pole capacity available to a utility, whether installed in the distribution chain or available from inventory or through reasonable make-ready by way of change-outs, rearrangements, and the like. Similarly, the Commission should consider making specific modifications to its non-rate access and cost allocation rules.

Accordingly, in order to prevent utility abuse of essential bottleneck distribution facilities and anticompetitive practices towards attachers providing competing broadband services, the Commission should require BPL Providers to reasonably make capacity available to accommodate attachments of wire facilities.[1]

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[1] BPL deployment is not limited to investor-owned utilities. BPL has attracted significant interest from many rural electric cooperatives and municipally-owned utilities, including the Coweta-Fayette Electric Membership Corporation, the Los Angeles Department of Water and Power, Peninsula Electric Cooperative, the City of Manassas Virginia, Central Virginia Electric Cooperative, South Central Indiana REMC, Butler Rural Electric Cooperative, Southern Maryland Electric Cooperative, and the West Florida Electric Cooperative, to name a few. Although these entities are not directly subject to 47 U.S.C. § 224, competition from these types of largely unregulated entities is increasing, and any action by the Commission addressing investor-owned electric utilities' BPL efforts will likely influence municipal and cooperative utilities' BPL implementation plans and pole attachment practices.

COMMENTS

I. Background

The Florida Cable & Telecommunications Association, the Cable Television Association of Georgia, the South Carolina Cable Association, the California Cable & Telecommunications Association, the Alabama Cable Telecommunications Association, and the Cable Telecommunications Association of Maryland, Delaware, and the District of Columbia ("Joint Commenters") file these comments on behalf of themselves and their cable operator members. The cable operator members represented by the Joint Commenters provide video, Internet, and voice services to several million customers in their respective service areas.

Section 224 of the Communications Act grants cable operators and telecommunications carriers certain rights to attach their facilities to utility poles, a provision deemed necessary because poles are essential facilities and communications carriers are generally prohibited from building their own pole infrastructure where poles have already been placed. In the course of deploying or modifying their facilities, cable operators will occasionally request or need access to a pole which has no immediately available space for new attachments unless existing facilities on the pole are rearranged or the pole is changed out, a process known as "make-ready."

In such situations, typically the cable operator requesting or needing access will pay the utility to make space available by covering 100% of the costs of a new, taller pole and paying for the pole's installation, or by paying to rearrange existing wires to make existing space available consistent with pole engineering and safety requirements. This procedure allows cable operators to attach their facilities at no cost to the utilities and with a net benefit to the utilities, as they assume title to the new pole (which was paid for entirely by the attacher) and may then charge rent to the attacher as well as any new or existing third party attacher with attachments on the new pre-paid pole. Such acts of making capacity available include efforts to replace poles with

taller or stronger ones able to carry more facilities, to rearrange existing wires and other equipment on a pole to make space available, or to take other reasonable make-ready steps to accommodate attachers wherever it is reasonably technically possible to do so.

However, despite this existing practice and contractual provisions regarding make-ready, section 224(f) allows "utilities providing electric service" to deny attachers access to poles when there is "insufficient capacity." Certain electric utilities have begun to insist on the right to deny access for a variety of reasons even when capacity is readily available through reasonable make-ready. Specifically, the Commission's rule on access was challenged by a group of electric utilities in *Southern Company v. FCC.*[2]

In *Southern Company*, the 11th Circuit held that the Commission's regulations requiring utilities to "expand" capacity were overbroad in light of the statutory language in Section 224(f) of the Act and vacated the rule.[3] However, the court also found that utilities may not make a unilateral determination that capacity is insufficient for third-party attachments.[4] Specifically, the court explained that electric utilities do not have "unfettered discretion" to determine insufficient capacity because that could only be found as to a particular pole "*when it is agreed* that capacity is insufficient."[5] Thus, only where a third-party attacher agrees that a taller pole, rearrangement, or other make-ready is not feasible could capacity be deemed "insufficient" to justify a denial of access.

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[2] *Southern Company, et. al. v. Federal Communications Commission,* 293 F.3d 1338, (11th Cir. 2002) ("*Southern Company*").

[3] *Southern Company,* 293 F.3d at 1347-49.

[4] *Id.*

[5] *Id.* at 1347 (emphasis added).

The court reached its conclusions because it found the meaning of "insufficient capacity" to be ambiguous.[6] The court found that "[w]hen it is agreed that capacity is insufficient, there is no obligation to provide third parties with access..." which requires both the pole owner and the attacher to agree that capacity is insufficient before a utility may deny access.[7] In this respect, *Southern Company* affirmed the prior Commission decision to reject utilities' arguments that Section 224(f)(2) entrusted them with "unfettered discretion" to determine "insufficient capacity," noting that this interpretation bears no support in the Act.[8]

As has been noted previously, protection from anticompetitive pole attachment abuses should be addressed by the Commission in the BPL Context.[9] Recent utility anticompetitive and discriminatory behavior has been documented in comments filed in the proceeding leading up to the *BPL Interference Order.*[10] Utility pole attachment practices observed in those comments continue today: cable operators attempting to attach to electric utility-owned poles continue to experience in delays in accessing poles, efforts to extract excessive pole attachment rental rates have skyrocketed, and the imposition of inspections and pole loading studies and formal permit

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[6] *Southern Company,* 293 F.3d at 1348-49. In fact, the Court emphasized that the Act does not define the statutory term "insufficient capacity" and does not describe the conditions that would indicate when capacity is insufficient. *Id.* The Court further explained that the statute "is silent on the scope and parameters of the term 'insufficient capacity...'" and accorded Chevron deference to the Commission's reasonable interpretation regarding reservation of pole space to fill the "gap in the statutory scheme." *Id.*

[7] *Southern Company at* 1347-49.

[8] *Id.*

[9] *Amendment of Part 15 regarding new requirements and measurement guidelines for Access Broadband over Power Lines*, 19 FCC Rcd 21265, Statement of Commissioner Michael J. Copps (rel. October 14, 2004) ("*BPL Interference Order*") ("...today's item dodges some of the hardest BPL questions. . . . [I]ssues such as universal service... *pole attachments*, competition protections, and, critically, how to handle the potential for cross-subsidization between regulated power businesses and unregulated communications businesses...) (emphasis added).

[10] See Comments of Joint Cable Operators, ET Docket No. 03-104 (filed July 7, 2003); Reply Comments of Joint Cable Operators, ET Docket Nos. 03-104, 04-37 (filed June 22, 2004); Comments of the National Cable & Telecommunications Association, ET Docket Nos. 03-104, 04-37 (filed May 3, 2004).

requirements for overlashing continue to be all too common. These actions delay cable broadband network deployments and make them significantly more expensive. The Joint Commenters are concerned that even the prospect of BPL system deployments may lead to an escalation of these practices as utilities' competitive neutrality with regard to third-party pole use is reduced.[11]

The Joint Commenters note that the UPLC filed the instant petition just weeks before a scheduled utility VoIP over BPL commercial rollout was to take place in Cincinnati.[12] These and other recent utility plans to access the telephone market with VoIP over BPL at the same time cable operators are entering this market only increases their incentives to engage in anticompetitive behavior with their essential facilities. Indeed, the anticompetitive practices have escalated. Union Electric Company d/b/a AmerenUE, a BPL provider, recently commenced a state court lawsuit against Charter Communications, Inc. in an effort to extract over ten million dollars in fees and penalties following Charter's deployment of VoIP services in AmerenUE's footprint.[13]

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[11] For example, when PEPCO affiliated with RCN, an overbuilder, PEPCO sought to reserve all capacity on the pole for RCN use, but eventually relented under pressure. *See* Petition to Deny of Yipes Transmission, Inc., *In the Matter of Connectiv and New RC, Inc. For Authority to Transfer Control of Domestic Section 214 Authority*, CC Docket No. 02-2, p. 4-6 (filed March 1, 2002).

[12] "Current Readies Voice over BPL," Red Herring Magazine (January 3, 2006). Available online at: http://www.redherring.com/Article.aspx?a=15130&hed=Current+Readies+Voice+over+BPL#.

[13] *See* Complaint of Charter, *Charter Communications Inc. v. Union Electric Company d/b/a AmerenUE*, File No. EB-05-MD-030, p.1 (filed November 30, 2005). *See also* Reply of Charter, *Charter Communications Inc. v. Union Electric Company d/b/a AmerenUE*, File No. EB-05-MD-030, p.39-41 (filed February 7, 2006) (discussing AmerenUE's BPL project and the history of utility anticompetitive behavior during periods of entry into communications markets). AmerenUE alleged that VoIP was a "telecommunications" service entitling it to collect higher pole rents although the Commission has not yet made the classification in the pending IP-Enabled services rulemaking. Reply of Charter at p.11-12. Virtually identical disputes over utility rate assessment methodology have been before the Commission in the past year. *See CenterPoint Energy Houston Electric, LLC v. Texas Cable Partners, L.P. d/b/a Time Warner Cable*, Memorandum Opinion and Order, DA-06-35 (January 9, 2006); *Cable Television*

II. In Conjunction With Classifying BPL Service as an Information Service, The Commission Should Require Utilities to Make "Capacity" Available Through Reasonable Make-Ready Under 224(f)(2)

The Joint Commenters' position is that the *Southern Company* language requiring agreement on insufficient capacity is meant to protect cable operators and telecommunications carriers from discriminatory treatment by utilities, which otherwise could plea "insufficient capacity" as an excuse to refuse to perform make-ready and unreasonably deny attachers access to their poles. The Commission should now find that BPL classification presents an opportunity to afford pole attachment protections as utilities begin to compete head to head with their own broadband offerings. A finding that the term "capacity" in Section 224(f)(2) refers not only to capacity on installed poles but all capacity at the disposal of the utility, through reasonable make-ready, at the time of the request for attachment would be consistent with the *Southern Company* decision. The Commission has ample authority to fill in gaps in the statutory framework, particularly given the finding in *Southern Company* that the term "insufficient capacity" is ambiguous.[14]

While Petitioner UPLC asserts that classifying BPL as an information service would serve the public interest by promoting broadband access and competition,[15] the cable industry has a legitimate cause for concern that electric utilities deploying BPL will engage in anticompetitive practices in dealing with parties seeking to attach wire facilities to utility owned poles pursuant to Section 224.[16] Electric utilities are already refusing to agree to contract language on change-outs or rearrangements on the grounds that federal pole attachment law

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Association of Georgia v. Georgia Power, File No. PA 01-002 (joint report filed October 11, 2005).

[14] *See Supra*, n 6.

[15] UPLC Petition at 5-6.

[16] 47 C.F.R. § 224.

permits them to deny access when they say a pole has "insufficient capacity" for another attacher, regardless of the circumstances surrounding the condition of the pole.[17] Without the ability to attach their facilities to poles by means of reasonable make-ready, cable operators can not be assured of the ability to comply with franchise, business and competitive needs to serve customers in new areas, replace or upgrade existing facilities, or carry on their business in a competitive market. Joint Commenters do not suggest that make-ready should be done at the expense of the utility but at the expense of the attacher when the need for make-ready is reasonably attributed to the needs of the new, modified or upgraded attachment, consistent with 47 U.S.C. § 224(i).

Although classifying BPL as an information service would be consistent with the Commission's classifications of cable modem and DSL services, streamlining the utilities' entry into broadband should be balanced by assurances that their competitors have streamlined entry as well. Otherwise, electric utilities will be able to deny access to their competitors while at the same time telling existing attachers on newly defined "full capacity" poles that existing attachers must pay a "just compensation" rental which they calculate to be substantially more than the federal formula allows.[18] As planned BPL rollouts come closer to reality, utilities have begun more forceful about reserving their rights to deny capacity based on claimed insufficient pole space. BPL competition with cable modem and VoIP service will give utilities cause to replicate the anticompetitive conduct and practices that have been documented over the years.[19]

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[17] *See* Joint Report, *Cable Television Association of Georgia v. Georgia Power*, File No. PA 01-002, p. 11-13 (filed October 11, 2005).

[18] *See Florida Cable & Telecommunications Association v. Gulf Power,* Order, 18 FCC Rcd 15 (rel. May 13, 2003) ("*FCTA v. Gulf Power*"), *designated for hearing,* 19 FCC Rcd 18718 (rel. September 27, 2004); *Alabama Power v. FCC*, 311 F.3d 1357 (11th Cir. 2002).

[19] *See National Cable & Telecommunications Association v. Gulf Power Co.*, 534 U.S. 327, 330 (2002) ("Since the inception of cable television, cable companies have sought the means to run a wire into the home of each subscriber. They have found it convenient, and often essential, to

Utilities routinely set new poles or rearrange facilities to accommodate their own facilities when necessary and should not be allowed to refuse an attaching party's request for additional capacity when that party is willing to bear all costs of make-ready and when the utility has taller poles in its inventory. Accordingly, the Commission should condition any information service classification for BPL on the express obligation of power companies to perform reasonable make-ready for pole facilities available when there would otherwise be no room to attach a new wire. Specifically, the Commission should find that the term "capacity" under Section 224(f)(2) refers to all pole capacity available to a utility whether installed in the distribution chain, in inventory or available through reasonable make-ready.

Moreover, the Commission must take additional measures to prevent pole owners who have the opportunity, and with BPL, the motive, from using their control over poles to harm their cable competitors as they deploy and market competitive services. Such utility actions would endanger Congress's goal of ensuring access to poles on just and reasonable rates, terms, and conditions.[20] Accordingly, the Commission should (1) carefully monitor utilities' engineering, pole loading, and audit requirements as applied to third party attachers to prevent any increase in anti-competitive actions by those utilities deploying BPL; and (2) be prepared to supplement existing non-rate access and cost allocation precedent to the extent BPL systems progress through these trial stages.

III. Information Service Classification for BPL Should Be Conditioned Upon A Finding That Utilities May Not Claim 224(f)(2) Capacity Exemptions

The FCC has the authority to act on Joint Commenters request pursuant to its Title 1 ancillary authority under section 4(i) and 224 of the Act, specifically 224(f) of the Act, to ensure

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lease space for their cables on telephone and electric utility poles. Utilities, in turn, have found it convenient to charge monopoly rents.").

[20] *See* 47 U.S.C. § 224(b)(1).

the right of mandatory access to poles continues. The Joint Commenters' request for regulations concerning pole capacity is necessary for the FCC's continued enforcement of the nondiscriminatory access provisions of 224(f).

The Commission has considered its authority to impose nondiscriminatory access regulations on information service providers under Title I[21] and has previously considered imposing a variety of access and consumer protection regulations on information services in both the wireline broadband and cable modem contexts.[22] Furthermore, the Commission's Title I ancillary jurisdiction to impose Title II-type regulations on information services was upheld by the Supreme Court.[23] In *Brand X*, the Court noted:

> In the *Computer II* rules, the Commission subjected facilities-based providers [of information services] to common-carrier duties not because of the nature of the "offering" made by those carriers, but rather because of the concern that local telephone companies *would abuse the monopoly power they possessed by virtue of the "bottleneck" local telephone facilities they owned.* The differential treatment of facilities-based carriers was therefore a function not of the definitions of "enhanced-service" and "basic service," but instead of a choice by the Commission to regulate more stringently, in its discretion, certain entities that provided enhanced service. [...] the Commission remains free to impose special regulatory duties on facilities-based ISPs under its Title I ancillary jurisdiction. In fact, it has invited comment on whether it can and should do so. (emphasis added)[24]

Consistent with the Commission's broad mandates to ensure that competition in various communications markets thrives,[25] a requirement that BPL Providers must make pole capacity

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[21] See *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 14853, ¶109 (rel. September 23, 2005) ("Wireline Broadband Order").

[22] *Wireline Broadband Order* at ¶¶ 147-157; *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, 17 FCC Rcd 4798, ¶95 (rel. March 15, 2002) ("*Cable Modem Order*").

[23] *National Cable & Telecommunications Association v. Brand X Internet Services*, 125 S.Ct. 2688 (2005) ("*Brand X*").

[24] *Brand X* at 2708 (citations to Computer II and Computer III omitted).

[25] *See Cable Modem Order* at ¶ 75.

available upon request of an attaching party – at the cost of the attaching party – would serve the public interest by promoting facilities based competition in the broadband market and further ensure broadband access to all Americans as required by Section 706 of the Telecommunications Act.[26]

Anticompetitive pole attachment practices threaten the vibrancy of broadband competition and must be addressed.[27] Although the Commission chose not to address this issue in the *BPL Interference Order*, the Joint Commenters believe that the Commission should take the opportunity to do so here to protect cable operator attachers and ensure the public continues to enjoy robust broadband competition in all areas of the country, including those areas which may only be accessed through the use of existing pole distribution facilities.

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[26] 47 U.S.C. § 157.

[27] See *BPL Interference Order* (and accompanying text at n.9, *Supra*).

CONCLUSION

For all the foregoing reasons, the Commission should require BPL Providers to make capacity available at the request of a communications service provider entitled to attachment under Section 224 by making a finding in favor of Joint Commenters as proposed here, and adopt such other provisions prohibiting and sanctioning anticompetitive conduct as appropriate.

Respectfully submitted,

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